

AMENDMENT NUMBER 5
to
CONTRACT NUMBER DIR-SDD-220
BETWEEN
THE STATE OF TEXAS, DEPARTMENT OF INFORMATION RESOURCES
AND
GATEWAY COMPANIES, INC.

This Amendment Number 5 is to Contract Number DIR-SDD-220 (“Contract”) between the Department of Information Resources (“DIR”) and Gateway Companies, Inc. (“Vendor”). DIR and Vendor agree to the following:

1. **Section 2. of Contract, Term of Contract is hereby** extended through the period February 7, 2009, or until terminated pursuant to the termination clauses contained in the Contract. Prior to expiration of the Contract term, DIR and Vendor may extend the Contract, upon mutual agreement, for up to one (1) additional one-year term.
2. **Section 3.A. of Contract, Products** is hereby restated in its entirety as follows:

Products awarded under this Contract are based on Vendor’s response to RFO DIR-SDD-TMP-058 and include:

- 1) information technology products manufactured/co-branded by Gateway Companies, Inc.;
- 2) Hitachi San Solution products specified in Appendix C, Pricing and Product Index; and
- 3) third-party information technology products identified as Gateway Accessory Store Items in Appendix C, Pricing and Product Index. As per the original intent of the parties to the Contract, the Gateway Accessory Store Items section may be updated as necessary to add or delete “Other Brands” product categories throughout the term of the contract via formal amendment.

Vendor may incorporate changes to their product offering; however, any changes must be within the scope of products awarded based on Vendor’s response to RFO DIR-SDD-TMP-058.

3. **Section 6 of Contract, Notification** is updated as follows:

If sent to the Vendor:

Gateway Companies, Inc., a subsidiary of MPC Pro. LLC

PO Box 1880

300 N. Centennial Drive Suite 220

Mail Drop Y-30

North Sioux City, SD 57049

Phone: (800) 846-2030 x27302

Email: kris.mogensen@mpccorp.com

4. **Section 8, Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts**, is hereby revised to include the following:

K All references to Catalog Information System Vendors (CISV) in Appendix A are hereby deleted.

L All references to Texas Building and Procurement Commission (TBPC) are hereby revised and replaced with Texas Comptroller of Public Accounts (CPA)

5. **Appendix A, Section 3.A Definitions, Customer**, is hereby restated in its entirety as follows:., any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, any local government as authorized through the Interlocal Cooperation Act, Chapter 791, Texas Government Code, and the state agencies and political subdivisions of other states as authorized by Section 2054.0565, Texas Government Code and, except for telecommunications services under Chapter 2170, Texas Government Code, assistance organizations as defined in Section 2175.001, Texas Government Code to mean:

- a. A non-profit organization that provides educational, health or human services or assistance to homeless individuals;
- b. A nonprofit food bank that solicits, warehouses, and redistributes edible but unmarketable food to an agency that feeds needy families and individuals;
- c. Texas Partners of the Americas, a registered agency with the Advisory Committee on Voluntary Foreign Aid, with the approval of the Partners of the Alliance Office of the Agency for International Development;
- d. A group, including a faith-based group, that enters into a financial or non-financial agreement with a health or human services agency to provide services to that agency's clients;
- e. A local workforce development board created under Section 2308.253;

- f. A nonprofit organization approved by the Supreme Court of Texas that provides free legal services for low-income households in civil matters;
- g. The Texas Boll Weevil Eradication Foundation, Inc., or an entity designated by the commissioner of agriculture as the foundation's successor entity under Section 74.1011, Texas Agriculture Code;
- h. A nonprofit computer bank that solicits, stores, refurbishes and redistributes used computer equipment to public school students and their families; and
- i. A nonprofit organization that provides affordable housing.

6. **Appendix A, Section 9.A Indemnification** is hereby restated in its entirety as follows:

A1. Indemnification

1) INDEPENDENT CONTRACTOR

VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, IT IS FURNISHING SERVICES IN THE CAPACITY OF AN INDEPENDENT CONTRACTOR AND THAT VENDOR IS NOT AN EMPLOYEE OF THE CUSTOMER, DIR OR THE STATE OF TEXAS.

2) Acts or Omissions

Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract.—VENDOR SHALL PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS FEES THAT A COURT FINALLY AWARDS AS A RESULT OF ANY SUCH CLAIM. THE DEFENSE SHALL BE COORDINATED BY THE OFFICE OF THE ATTORNEY GENERAL FOR TEXAS STATE AGENCY CUSTOMERS AND BY CUSTOMER'S LEGAL COUNSEL FOR NON-STATE AGENCY CUSTOMERS. Vendor shall not be liable for damages that are the result of negligence of the Customer, the State of Texas and/or their employees, agents, representatives, contractors, assignees, and/or designees.

3) Infringements

a) Vendor shall indemnify and hold harmless the State of Texas and Customers, AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES, from any and all third party claims involving infringement of United States patents,

copyrights, trade and service marks, and any other intellectual or intangible property rights caused by Vendor manufactured Hardware Products, except for (a) any product or part not manufactured by it; (b) any Product or part manufactured by it which has been changed, modified, adapted or refitted without the express written authorization of the Vendor; (c) any Product or part not within Vendor's standard inventory but purchased by the Vendor at the specific direction of the Customer; (d) any Product or part manufactured to customer's design; (e) any claim of infringement arising from the use of any Product in conjunction with any other product as a combination not furnished by the Vendor; or (f) any software provided with such Products, including the operating system in connection with the PERFORMANCES OR ACTIONS OF VENDOR PURSUANT TO THIS CONTRACT. VENDOR AND THE CUSTOMER AGREE TO FURNISH TIMELY WRITTEN NOTICE TO EACH OTHER OF ANY SUCH CLAIM. VENDOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY THE OFFICE OF THE ATTORNEY GENERAL FOR TEXAS STATE AGENCY CUSTOMERS AND BY CUSTOMER'S LEGAL COUNSEL FOR NON-STATE AGENCY CUSTOMERS.

b) If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense: (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing.

4) PROPERTY DAMAGE

IN THE EVENT OF LOSS, DAMAGE, OR DESTRUCTION OF ANY PROPERTY OF CUSTOMER OR THE STATE DUE TO THE NEGLIGENCE, MISCONDUCT, WRONGFUL ACT OR OMISSION ON THE PART OF THE VENDOR, ITS EMPLOYEES, AGENTS, REPRESENTATIVES, OR SUBCONTRACTORS, THE VENDOR SHALL PAY THE FULL COST OF EITHER REPAIR, RECONSTRUCTION, OR REPLACEMENT OF THE PROPERTY, AT THE CUSTOMER'S SOLE ELECTION. SUCH COST SHALL BE DETERMINED BY THE CUSTOMER AND SHALL BE DUE AND PAYABLE BY THE VENDOR NINETY (90) CALENDAR DAYS AFTER THE DATE OF THE VENDORS RECEIPT FROM THE CUSTOMER OF A WRITTEN NOTICE OF THE AMOUNT DUE. VENDOR SHALL NOT BE LIABLE FOR DAMAGES THAT ARE THE RESULT OF NEGLIGENCE OF THE CUSTOMER, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES.

A2. TAXES/WORKER'S COMPENSATION/UNEMPLOYMENT INSURANCE

1) VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, VENDOR SHALL BE ENTIRELY RESPONSIBLE FOR THE LIABILITY AND PAYMENT OF VENDOR'S AND VENDOR'S EMPLOYEES' TAXES OF WHATEVER KIND, ARISING OUT OF THE PERFORMANCES IN THIS CONTRACT. VENDOR AGREES TO COMPLY WITH ALL STATE AND FEDERAL LAWS APPLICABLE TO ANY SUCH PERSONS, INCLUDING LAWS REGARDING WAGES, TAXES, INSURANCE, AND WORKERS' COMPENSATION. VENDOR AGREES AND ACKNOWLEDGES THAT VENDOR ITS EMPLOYEES, REPRESENTATIVES, AGENTS OR SUBCONTRACTORS SHALL NOT BE ENTITLED TO ANY STATE BENEFIT OR BENEFIT OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER. THE CUSTOMER AND/OR THE STATE SHALL NOT BE LIABLE TO THE VENDOR ITS EMPLOYEES, AGENTS, OR OTHERS FOR THE PAYMENT OF TAXES OR THE PROVISION OF UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR ANY BENEFIT AVAILABLE TO A STATE EMPLOYEE OR EMPLOYEE OF ANOTHER GOVERNMENTAL ENTITY CUSTOMER.

2) VENDOR AGREES TO INDEMNIFY AND HOLD HARMLESS CUSTOMERS, THE STATE OF TEXAS AND/OR THEIR EMPLOYEES, AGENTS, REPRESENTATIVES, CONTRACTORS, ASSIGNEES, AND/OR DESIGNEES FROM ANY AND ALL LIABILITY, ACTIONS, CLAIMS, DEMANDS, OR SUITS, AND ALL RELATED COSTS, ATTORNEY FEES, AND EXPENSES, RELATING TO TAX LIABILITY, UNEMPLOYMENT INSURANCE AND/OR WORKERS' COMPENSATION OR EXPECTATIONS OF BENEFITS BY VENDOR, ITS EMPLOYEES, REPRESENTATIVES, AGENTS OR SUBCONTRACTORS IN ITS PERFORMANCE UNDER THIS CONTRACT. VENDOR SHALL BE LIABLE TO PAY ALL COSTS OF DEFENSE INCLUDING ATTORNEYS' FEES. THE DEFENSE SHALL BE COORDINATED BY THE OFFICE OF THE ATTORNEY GENERAL FOR TEXAS STATE AGENCY CUSTOMERS AND BY CUSTOMER'S LEGAL COUNSEL FOR NON-STATE AGENCY CUSTOMERS.

7. **Appendix A, Section 9 Vendor Responsibilities, Subsection J** is hereby restated in its entirety as follows:

J. Limitation of Liability

For any claim or cause of action arising under or related to the Contract: i) except for claims of infringement of the other party's intellectual property, none of the parties shall be liable to the other for incidental, exemplary or punitive, special, or consequential damages, even if it is advised of the possibility of such damages; and ii) Vendor's liability for damages of any kind to the Customer

shall be limited to the total amount paid to Vendor for the Services which gave rise to the claim during the twelve months immediately preceding the accrual of the claim or cause of action.

8. **Appendix C, Pricing and Product Index**, is hereby replaced in its entirety with the restated Appendix C dated: January 23, 2008 as attached to this Amendment Number 5.
9. **Appendix D, Pricing and Product Offering for Standard Configurations**, is replaced in its entirety with the restated Appendix D, Pricing and Product Index for Standard Configurations dated January 15, 2008. The purpose of this restatement is to reflect the current desktop and notebook standard configuration offerings as attached to this Amendment Number 5.
10. All other terms and conditions of the Contract, not specifically modified herein, shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be Amendment 5, Amendment 4, Amendment 3, Amendment Number 2, Amendment Number 1, and finally Contract DIR-SDD-220.

IN WITNESS WHEREOF, the parties execute this Amendment Number 5 to be effective as of February 7, 2008.

Gateway Companies, Inc.

**The State of Texas, acting by and through
the Department of Information Resources**

Authorized By: signature on file

Authorized By: signature on file

Name: Tim McLabe

Name: Cindy Reed

Title: Director, Sales

Title: Deputy Executive Director, Operations & Statewide
Technology Sourcing

Date: 2/5/08

Date: 2/7/08

Legal: Cynthia Kreider, 2/6/08